Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Counsel for Petitioner

TABLE OF CONTENTS

Page

ARGUMENT 1

I. WRIGLEY'S CONSTRUCTION OF § 381 DOES NOT PROMOTE CLARITY AND CERTAINTY AND RESULTS IN THE PROTECTION OF LARGE RATHER THAN SMALL BUSINESS. 1

A. Congress' Goal In Enacting § 381 Was To Create Clarity And Certainty So That Small Businesses Would Continue To Attempt To Develop New Markets In Other States. 1

B. The Language Employed By Congress Is The Starting Point For Determining How It Alleviated The Uncertainty Created By *Portland Cement*. 3

C. Wrigley's Construction Of "Solicitation" Does Not Result In The Minimum Deviation From The Commonly Understood Meaning Of That Term Which Produces Clarity And Certainty. 4

D. The Statutory Term "Only" Promotes Clarity And Certainty By Precluding An Ambiguous *De Minimis* Exemption From Taxation Based Upon The Volume Of Sales Or Other Activities Conducted Within The Taxing State. 11

Page

E. Under Any Plausible Construction Of § 381, Wrigley Engaged In Activities Beyond The "Mere Solicitation" Of Orders. 13

II. THE PROVISIONS OF § 381 CANNOT BE CONSTRUED IN A VACUUM, WITHOUT REFERENCE TO THE ECONOMIC REALITIES INHERENT IN THE CONCEPT OF NEXUS. . 17

A. In § 381, Congress Attempted To Eliminate Taxation Of Foreign Corporations By States In Which They Had Minimal Nexus. 17

B. Wrigley's Construction Of The Statute Discards The Concept Of Nexus That The Statute Reflects. 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES CITED

Bowen v. American Hosp. Ass'n,
476 U.S. 610 (1986) 5

Brown-Forman Distill. Corp. v. Collector of Revenue,
234 La. 651, 101 So. 2d 70 (1958),
cert. den., 359 U.S. 28 (1959) 6-8

Page

Burlington Northern R. Co. v. Oklahoma Tax Com'n,
481 U.S. 454 (1987) 4

Consumer Product Safety Com'n v. GTE Sylvania, Inc.,
447 U.S. 102 (1980) 7-8

D.H. Holmes Co. v. McNamara,
486 U.S. 24 (1988) 13

General Motors Corporation v. Washington,
377 U.S. 436 (1964) 18

Heublein, Inc. v. South Carolina Tax Commission,
409 U.S. 275 (1972) 2-7, 9, 10

International Shoe Co. v. Fontenot,
236 La. 279, 107 So. 2d 640 (1958),
cert. den., 359 U.S. 984 (1959) 6-7

Miles Laboratories, Inc. v. Department of Revenue
274 Or. 395, 546 P.2d 1081 (1986) 5

Miller Bros. Co. v. State of Maryland,
347 U.S. 340 (1954) 13

N.W. States Portland Cement Co. v. State of Minn.,
358 U.S. 450 (1959) 2, 3, 7, 11

Nelson Bros. v. Revenue Dept.
152 Wis. 2d 746, 449 N.W.2d 328 (Wis. App. 1989) . 13

Norton Co. v. Department of Revenue of State of Ill.,
340 U.S. 534 (1951) 13

Page

Smith Kline & French Laborataories v. State Tax Com'n,
241 Or. 50, 403 P.2d 375 (1965) 5

Tyler Pipe Indus. v. Wash. State Dept. of Rev.,
483 U.S. 232 (1987) 19

U.S. Tobacco Co. v. Com.,
478 Pa. 125, 386 A.2d 471,
cert. den., 439 U.S. 880 (1978) 5, 6, 11

U.S. Tobacco Co. v. Martin,
304 Ark. 119, 801 S.W.2d 256 (1990) 4

U.S. v. Wells Fargo Bank,
485 U.S. 351 (1988) 12

United States v. Bass,
404 U.S. 336 (1971) 5

William Wrigley, Jr. Co. v. DOR,
160 Wis. 2d 53, 465 N.W.2d 800 (1991) 4, 9, 13

William Wrigley, Jr. Co. v. Wis. DOR,
153 Wis. 2d 559, 451 N.W.2d 444 (Wis. App. 1989) . . 9

Woller v. Department of Taxation,
35 Wis. 2d 227, 151 N.W.2d 170 (1967) 13-14

Page

FEDERAL STATUTES AND RULES

15 U.S.C. § 381 . . . . . passim

15 U.S.C. § 381(a) 3

15 U.S.C. § 381(a)(1) 8, 9

15 U.S.C. § 381(a)(2) 9

OTHER AUTHORITIES

Hartman, "Solicitation" and "Delivery"
Under Pub. L. 86-272: An Uncharted Course,
29 Vand. L. Rev. 353 (1976) 9, 18

P. Hartman, Federal Limitations on State and Local
Taxation, § 9:11 (1981) 5

Tatarowicz, State Judicial and Administrative
Interpretations of U.S. Public Law 86-272,
38 Tax Lawyer 293 (1985) 5, 7

Webster's Third New International Dictionary 2169
(Unabridged 1961) 3-4

Page

CONGRESSIONAL MATERIAL

105 Cong. Rec. 16362 (1959) 17-18

105 Cong. Rec. 16469 (1959) 11

105 Cong. Rec. 16476 (1959) 17

105 Cong. Rec. 16481 (1959) 2

105 Cong. Rec. 16493 (1959) 2

105 Cong. Rec. 17771 (1959) 17

S. Rep. No. 658, 86th Cong., 1st Sess. (1959) 7

S. 2213 17

S. 2524 17

No. 91-119

In The

Supreme Court of the United States

October Term, 1991

WISCONSIN DEPARTMENT OF REVENUE,

Petitioner,

v.

WILLIAM WRIGLEY, JR. COMPANY,

Respondent.

On Writ of Certiorari To
The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. WRIGLEY'S CONSTRUCTION OF § 381 DOES NOT PROMOTE CLARITY AND CERTAINTY AND RESULTS IN THE PROTECTION OF LARGE RATHER THAN SMALL BUSINESS.

A. Congress' Goal In Enacting § 381 Was To Create Clarity And Certainty So That Small Businesses Would Continue To Attempt To Develop New Markets In Other States.

The Court itself has said that the "impetus" behind the enactment of 15 U.S.C. § 381 was its decision in *N.W. States Portland Cement Co. v. State of Minn.*, 358 U.S. 450 (1959) and that "[c]larity that would remove uncertainty was Congress' primary goal." *Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 280 (1972).

Senator Ervin, a proponent of the senate bill, explained that one of its goals was to "prevent the erection of trade barriers" by granting relief to "small businesses, which cannot maintain large legal staffs and many accountants[.]" 105 Cong. Rec. 16481 (1959). After passage of the Talmadge Amendment, the bill was transformed from one which would have protected many existing sales activities conducted by larger foreign corporations through their sales offices to one which permitted "small businesses" to send salesmen into other states in order to compete with "[b]ig business concerns." 105 Cong. Rec. 16493 (1959). Through the passage of § 381, such businesses were assured that "'mere solicitation'" could be conducted in foreign states. *Heublein*, 409 U.S. at 280.

Under Wisconsin's pre-sale/post-sale solicitation standard, only those acts occurring prior to the sale which seek to induce the prospective customer to place an order are permissible. Wrigley's protestations to the contrary notwithstanding (Resp. Br. at 21), solicitation need not be successful. And, to use Wrigley's terminology, "acts inextricably bound up in making the sales pitch" (Resp. Br. at 16-17) do not lose their character as solicitation activities even if some sales have already been made. But acts, such as the replacement of stale or damaged goods, performed in connection with prior sales result in a forfeiture of immunity under § 381.

The Multistate Tax Commission's "dual purpose" test (MTC Br. at 24) provides a useful framework for assessing whether the acts in question are inextricably related to the sales pitch. For example, Wrigley's credit mediation activities, which were discontinued in 1976, may have benefitted the customer by enabling it to receive an uninterrupted supply of gum, but they also enabled Wrigley to solve accounting and other problems with the delinquent account. They, therefore, are not inextricably related to the sales pitch.

The ensuing portion of this brief explains why Wrigley's analysis of the relevant provisions of § 381 fails when tested, not only against the manner in which § 381 was construed in *Heublein*, but also against Congress' goal of affording limited immunity to small businesses in order to enable them to compete with their larger counterparts (Pet. Br. at 22-23). In our original brief, we explained how Wisconsin's pre-sale/post-sale solicitation standard passes those tests.

B. The Language Employed By Congress Is The Starting Point For Determining How It Alleviated The Uncertainty Created By *Portland Cement*.

Congress did not immunize all business activities conducted by a foreign corporation. In § 381(a), it defined those "business activities" that would not support taxation as being limited to "solicitation."

While touting the reasoning of the decision below, Wrigley surreptitiously attempts to disavow its holding that the ordinary and accepted meaning of the term "solicit" is to "ask," "entreat," "importune" or "request" that an order be placed. *Webster's Third New International*

Dictionary 2169 (Unabridged 1961). *See William Wrigley, Jr. Co. v. DOR*, 160 Wis. 2d 53, 465 N.W.2d 800, 809 (1991). Without citing any applicable canon of federal statutory construction that permitted it do so, that court nevertheless turned immediately to the legislative history of the statute in order to ascertain the meaning of the term "solicitation." *Id.*, 465 N.W.2d at 809.

If the statutory terminology does indeed have the "plain meaning" (Resp. Br. at 13) ascribed to it by the court below, then it did not need to refer to the legislative history at all. *See Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461 (1987). To the extent that the meaning of the term "solicitation" is plain, the Wisconsin Supreme Court should therefore have adopted the construction of that term employed by the Arkansas and New Jersey courts (Pet. Br. at 19 n.8). *Also see U.S. Tobacco Co. v. Martin*, 304 Ark. 119, 801 S.W.2d 256 (1990). Since the court did not adopt that construction, its resort to legislative history is supportable only if the term "solicitation" is determined to be ambiguous.

C. Wrigley's Construction Of "Solicitation" Does Not Result In The Minimum Deviation From The Commonly Understood Meaning Of That Term Which Produces Clarity And Certainty.

Wrigley's position is that Congress "failed to lay down the metes and bounds of the language used" (Resp. Br. at 13) (footnote omitted). If that is the case, then the term "solicitation" is ambiguous. In *Heublein*, 409 U.S. at 281-82, the Court explained how it will construe ambiguous terms in this very statute: "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance,'" *quoting*

United States v. Bass, 404 U.S. 336, 349 (1971). *Accord, Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 643 n.33 (1986).

Wrigley does not explain how its construction of the term "solicitation" comports with the methodology employed in *Heublein* for construing ambiguous terminology in § 381. Instead, it simply praises the court's reliance in *Wrigley* upon the majority holding in *U.S. Tobacco Co. v. Com.*, 478 Pa. 125, 386 A.2d 471, *cert. den.*, 439 U.S. 880 (1978), claiming that those are the only two state court decisions which are "firmly grounded on the legislative history" (Resp. Br. at 18).[1]

---

[1]In contrast to other state courts, the Oregon Supreme Court has "been in the vanguard of the States in developing an interpretation of 'solicitation'" because the State of Washington imposes no income or franchise tax. P. Hartman, *Federal Limitations on State and Local Taxation*, § 9:11, at 507 (1981). It has issued five published decisions construing § 381 and has had the benefit of thorough tax court decisions in each of those as well as other cases. *See* Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer 319 nn. 211, 212 (1985). In *Smith Kline & French Laboratories v. State Tax Com'n*, 241 Or. 50, 403 P.2d 375 (1965), it initially accepted the tax court's adoption of a broad solicitation standard like that advocated by Wrigley, thereby prohibiting Oregon from taxing any of the income realized in that case. Thereafter, in a series of decisions culminating in *Miles Laboratories, Inc. v. Department of Revenue*, 274 Or. 395, 546 P.2d 1081 (1986), both the tax court and the supreme court determined that such a broad legal standard was not supportable, but that a pre-sale/post-sale standard comported both with the language of the statute and with Congressional intent. This change was not motivated by provincial considerations, as evidenced by the fact that the taxpayer in

(continued...)

Without identifying the canon of statutory construction it had decided to employ, the court in *U.S. Tobacco*, 386 A.2d at 477, did make one rather lengthy reference to the Senate Report. But it also relied heavily on its own decisions from areas of state law unconnected with § 381 for the proposition that the term "solicitation" in the federal statute should be expansively construed. *Id.*, 386 A.2d at 479.

The two dissenters were unmoved by the four person majority's "disciplined attention" (Resp. Br. at 19) to the Senate Report. They felt the majority should have applied the canon that § 381 must be construed "to impose as few limitations upon the traditional state power to impose taxes as is consistent with the clear language of the section." *Id.*, 386 A.2d at 482. That is in the same kind of reasoning that the Court used in construing § 381 in *Heublein*. Wrigley has advanced no explanation as to why the Court should retreat from that rationale in this case.

Wrigley also suggests that any ambiguity in the term "solicitation" should be resolved by reference to the Louisiana Supreme Court's decisions in *Brown-Forman Distill. Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *cert. den.*, 359 U.S. 28 (1959) and *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So. 2d

---

[1](...continued)
Miles also avoided a portion of Oregon's tax by resorting to the provisions of § 381. When viewed in its entirety, the body of case law developed in Oregon is far more comprehensive than that developed in Pennsylvania and followed below. To the extent that deference should be accorded a particular state's decisional law due to the thoroughness of its examination of the parameters of § 381, that deference is therefore due the state of Oregon.

640 (1958), *cert. den.*, 359 U.S. 984 (1959) because they contributed to the "'considerable concern and uncertainty'" generated by the Court's later decision in *Portland Cement. Heublein*, 409 U.S. at 279-80, *quoting* S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2548, 2551.

There is no suggestion in the legislative history that Congress intended to define "solicitation" by approving the use of particular activities described in these or any other cases. The published decisions in *Brown-Forman* and *Fontenot* are exceedingly brief. Although Wrigley attempts to supplement the facts stated in the decisions themselves by making reference to certiorari petitions and opposing briefs filed in those cases, the legislative history suggests only that members of Congress were aware that certiorari had been denied in each case. There is no indication that they had detailed knowledge of the contents of documents filed with the Court when certiorari was sought in each case. The published decision in *Fontenot*, 107 So. 2d at 740, is in no way inconsistent with a pre-sale/post-sale solicitation standard, since it merely indicates that the company's "sole activity within this state consists of the regular and systematic solicitation of orders for its product by fifteen salesmen."[2] Similarly, the decision in *Brown-*

---

[2]Tatarowicz, *State Judicial and Administrative Interpretations of U.S. Public Law 86-272*, 38 Tax Lawyer at 302-03 (Resp. Br. at 15 n.8), says only that the result reached in *Fontenot* has been altered. And Wrigley's reliance on the Willis Report, H. Rep. No. 1480, 88th Cong., 2d Sess. 145 (1964), to support its argument is misplaced:

> Such history does not bear strong indicia of reliability, however, because as time passes

(continued...)

Forman, 101 So. 2d at 70, indicates that the "missionary men" involved in that case did *not* "solicit []or accept orders from the retail dealers." That published decision contains no indication that orders were solicited on behalf of the wholesaler by "missionary men." Since Congress did impose a "solicitation" requirement in connection with such activities, any concern it may have had with *Brown-Forman* cannot have related to specific activities of that company's "missionary men" in retail establishments. The only specific activities endorsed in the statute described the company's dealings with its wholesalers, from whom orders *were* solicited by "missionary men":

> [I]t ships its goods to customers in Louisiana upon orders submitted by the latter to its representatives in Louisiana who transmit said orders to Louisville where they are considered and approved or rejected . . . in the event of approval of the orders, the merchandise is shipped directly to the customer who remits payment to it at Louisville . . . .

Brown-Forman, 101 So. 2d at 70. *See* § 381(a)(1).

---

[2](...continued)

> memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

The "results reached in *Brown-Forman* and *Fontenot*" (Pet. Br. at 24) were that the systematic use by a foreign corporation of "missionary men" and "salesmen," respectively, without more, created nexus sufficient to tax. In §§ 381(a)(2) and 381(a)(1), Congress reversed each of those results. But it limited the activities that could be performed by such individuals "only" to "solicitation," without endorsing any set of business activities described in any particular reported decision. *See, e.g.*, Hartman, *"Solicitation" and "Delivery" Under Pub. L. 86-272: An Uncharted Course*, 29 Vand. L. Rev. 353, 390 (1976): "There is doubt whether a seller comes within the protection 'of solicitation' of orders only in state where the seller rents and display room." Since Wisconsin's pre-sale/post-sale standard does not preclude the use of either "salesmen" or "missionary men," it is not inconsistent with the legislative history of § 381.

To be sure, no construction of "solicitation" should be accepted that does not promote the goals of clarity and certainty identified by the Court in *Heublein*. But the court below admitted that the pre-sale/post-sale test does meet those goals. *Wrigley*, 465 N.W.2d at 809. Although that decision contains no language expressly coupling a physical facilities standard with a prohibition on in-state activities "routinely associated with deploying a sales force" (Resp. Br. at 19), any such standard would not promote clarity because it contains no yardstick for determining what that sales force can and cannot do. That problem was cogently addressed by the court of appeals below when it found that Wrigley had assigned a myriad of non-solicitation activities to its "sales" force. *William Wrigley, Jr. Co. v. Wis. DOR*, 153 Wis. 2d 559, 451 N.W.2d 444, 452 (Wis. App. 1989).

In the same vein, Wrigley suggests that Congress must have intended to immunize more than "'pure' solicitation" (Resp. Br. at 19). Again, Wrigley fails to explain how its alteration of two letters results in any change in the meaning of the term "mere solicitation" employed by the Court in *Heublein*, 409 U.S. at 280, 282.

No meaningful distinction is tenable. The industry-specific "solicitation" standard advocated by Wrigley hardly promotes clarity or certainty under the self-assessment system necessarily employed by all states which impose income or franchise taxes on foreign corporations. It presumes familiarity by taxing officials in each state with all methods employed by every industry in every other state in order to increase sales. Neither the statute nor the legislative history even remotely purport to impose such a burden.

Unlike each of the standards proffered by the *amici* supporting Wisconsin, Wrigley's standard also offers no clear point of departure for determining when a "business activity" conducted in a foreign state does *not* constitute "solicitation." Its only suggestion is that "in-state technical service" is "an act which is not closely associated with or inextricably bound up in solicitation" (Resp. Br. at 27). Conceptually, such activities are indistinguishable from complaint handling, picking up damaged goods and the like, because technical services can readily be characterized by the putative taxpayer as "legitimately made to obtain orders and to keep those orders coming so as to generate profits" (Resp. Br. at 16). Such a construction inevitably and inexorably permits any in-state activity by a foreign corporation whose sole business ultimately involves the sale of tangible personal property at retail, unless the activity involves the use of physical plant. Its necessary consequence is the pure physical

facilities standard which Wrigley's tax manager employed (JA 5; T_1:28). That standard, which Wrigley did not even meet during the tax years in issue, fails when tested against the language actually employed by Congress to deal with the uncertainty resulting from *Portland Cement*.

D. The Statutory Term "Only" Promotes Clarity And Certainty By Precluding An Ambiguous *De Minimis* Exemption From Taxation Based Upon The Volume Of Sales Or Other Activities Conducted Within The Taxing State.

The states supporting the use of a pre-sale/post-sale standard have convincingly demonstrated that the term "only" in § 381 means exactly what it says (Br. of Iowa, *et al.* at 8). Even *U.S. Tobacco*, 386 A.2d at 477, a decision hailed by Wrigley for its acumen in construing § 381, so holds.

Wrigley's response is that Congress must have been aware that the *de minimis* doctrine has been recognized by the Court in many different contexts (Resp. Br. at 28-29 and n.27). However, none of the cases cited even remotely involve statutes employing the term "only" so as to limit the preexisting powers of the states in an area as fundamental as taxation. Moreover, if Congress was indeed aware of such cases, its use of the term "only" is even more consistent with the premise that it did not want a *de minimis* doctrine employed in connection with this particular statute.

Wrigley also argues that a short exchange on the senate floor, 105 Cong. Rec. 16469 (1959), concerning the proposed insertion of the word "sole" in a section of the bill that was never adopted indicates that Congress must have

intended to create a *de minimis* exception when it used the term "only" in other sections of the adopted bill, even though the meaning of the latter term was never discussed.

Exemptions from taxation resulting from language employed by Congress "must be unambiguously proved." *U.S. v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). The statements and bill draft unsuccessfully relied upon by the taxpayer in that case were far more extensive than the brief colloquy cited by Wrigley here. *Id.*, 485 U.S. at 358. The legislative history relied upon therefore lacks the degree of probative value necessary to establish Wrigley's claim.

Next, Wrigley suggests that policy reasons dictate creation of a *de minimis* exception because a foreign corporation could not "predict its tax base" if a "glitch" were to occur (Resp. Br. at 30). No explanation is provided as to how such activity would be detected by a state in which a foreign corporation deliberately chooses not to file, as Wrigley did in this case (JA 3; T_1:25-26). Moreover, by its own admission (Resp. Br. at 5), Wrigley authorized its sales representatives to use the agency stock check procedure. In addition, both its regional manager and its sales representative "got permission from the company" to store an automobile and stock of goods in the Madison warehouse and were assured that they would be reimbursed by Wrigley for those costs (JA 62; T_2:22).

Wrigley also lamely claims that Wisconsin has long recognized a *de minimis* exception to § 381 (Resp. Br. at 28 nn. 28, 29). The authorities cited are a letter written prior to the passage of § 381 and a state administrative code provision enacted after the tax years in issue. Although Wisconsin may choose not to extend its taxing authority to the full extent permitted by § 381, there is no suggestion

that it did so during any of the tax years involved in this case. The two items cited by Wrigley, however, do not construe § 381 at all. They refer to the amount of solicitation necessary to support a finding of nexus. *Compare Miller Bros. Co. v. State of Maryland*, 347 U.S. 340 (1954). In contrast to *Miller Bros.*, here there is "'nexus aplenty.'" *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988). That nexus provides Wisconsin with jurisdiction to tax, and Congress must speak clearly when it chooses to withdraw such authority. Since the language it employed does not even remotely suggest a *de minimis* concept, no such statutory exemption can be said to exist.

E. Under Any Plausible Construction Of § 381, Wrigley Engaged In Activities Beyond The "Mere Solicitation" Of Orders.

The Wisconsin Supreme Court viewed this case as presenting "a question of law." *Wrigley*, 465 N.W.2d at 806. It therefore reviewed the construction of "solicitation" employed by the court of appeals and the Wisconsin Tax Appeals Commission *de novo*. *Id.*, 465 N.W.2d at 807. However, it did not overturn any of the Commission's findings of fact, which are reviewable under the substantial evidence test also employed by this Court in tax cases. *Compare Norton Co. v. Department of Revenue of State of Ill.*, 340 U.S. 534, 537-38 (1951) *with Nelson Bros. v. Revenue Dept*, 152 Wis. 2d 746, 760, 449 N.W.2d 328 (Wis. App. 1989). To the extent that the Commission's findings of fact are challenged by Wrigley, they should be tested under the standard of review described in those cases.

As to burden of proof, under Wisconsin law, "the burden of showing error in an assessment is on the taxpayer. Failure to present any evidence showing error

means that the case must be decided against the taxpayer." *Woller v. Department of Taxation*, 35 Wis. 2d 227, 233, 151 N.W.2d 170 (1967). Wrigley did prove that the practices of its two regional managers differed in some respects, thereby necessitating a procedural remand (not a reversal, as claimed by Wrigley) to the Commission to clarify its finding of facts concerning credit transactions (A 216). In all other respects, however, unless the record contains specific items of evidence to the contrary, any of Wrigley's practices which would justify the imposition of tax must be viewed as being applicable to all tax years in issue. This includes, for example, the disposal of stale gum in local landfills when a sales representative elected to do so (JA 39; T_1:92).

Under any construction of § 381, the fact that Wrigley authorized and ultimately incurred the cost of warehouse rental makes this an easy case. The size and cost of the warehouse rented is irrelevant; the question is whether the nature of the activity involves "mere solicitation." Under Wrigley's logic, the use of a very large warehouse at minimal cost or of an expensive bonded warehouse rented by an employe rather than Wrigley itself would be permissible, so long as the goods stored were used by its representatives to increase sales. Either device would facilitate additional sales by making frequent shipment of product unnecessary and assuring constant availability of all sizes and brands to every sales representative. Even under other bills defining immunity with reference to inventory and physical plant (Br. of Iowa, *et al.* at 19 n.3), Congress never distinguished between different kinds of warehouse space. It could not possibly have intended to immunize such activity.

Similarly, Wrigley's claim that its agency stock check procedure amounts to a *de minimis* violation of § 381 in

light of its huge dollar volume of Wisconsin sales, stands the purpose of the statute on its head. Under that rationale, a resident of Illinois who travels annually to Wisconsin to sell greeting cards and fills half of all orders received from the back of a station wagon would be subject to tax under § 381, even if the total dollar volume of all Wisconsin sales were less than the total dollar volume of Wrigley's agency stock checks alone. Although Wisconsin's position is that the agency stock checks and product swapping (Pet. Br. at 9), employed by Wrigley's sales representatives also constitute sales within Wisconsin, they surely involve delivery from a point within the state. To permit Wrigley to utilize such procedures in violation of § 381 when an itinerant sales representative with the same dollar volume of sales could not do so would transform the statute from a shield to be used by small businesses attempting to gain a toehold in new markets into a sword which could be used by large businesses to keep smaller competitors at bay.

Wrigley likewise contends, largely as a result of the small size and low cost of its product, that it did not have a stock of goods within Wisconsin. Each representative, however, generally had a minimum of 1,500,000 sticks of fresh and stale gum in his possession at any given time (JA 28; T_1:70–72). Wrigley apparently valued this gum for inventory purposes at approximately two to three cents per stick (JA 125–25; Ex. 13). A similar quantity or dollar value of both fresh and spoiled packaged grapefruit, for example, would necessitate the use of considerable warehouse space, even if up to forty percent of it were awaiting disposal in local landfills or shipment to Illinois. That this gum did, in reality, constitute a stock of goods within the state is illustrated by the fact that, on any given day, most of it remained in storage (JA 35; T_1:86).

Finally, Wrigley contends, in effect, that recruitment, hiring, training and firing of its Wisconsin representatives should not result in a forfeiture of immunity under § 381, because those activities were directed from Illinois. Wrigley then makes the related claim that all of these activities, as well as its sales meetings and in-state managerial activities are necessary to support the operation of a large but distant sales force.

All of the conduct described (Pet. Br. at 9-11), however, occurred in Wisconsin and did not involve solicitation at all, since there was no customer involvement or interest in Wrigley's performance of any aspect of any of these activities. As is the case with almost every defense it offers for its business practices, Wrigley also ignores the nature of the activity, and concentrates solely upon the role the activity plays in Wrigley's large multi-state operation.

The nature of the Wisconsin activity does not change merely because Wrigley chooses to add additional steps to the process in Illinois. The fact that such steps may be desirable or even essential to supervise continuous corporate activity sitused in other states serves only to illustrate that Wrigley has become too large to enjoy the benefits afforded by § 381. Its gargantuan size means that it no longer is able to engage in "mere solicitation." The operation of § 381 in that manner under Wisconsin's construction of the statute is entirely consistent with Congress' purpose of affording limited immunity to small businesses who must use sales representatives to develop new markets in foreign states.

II. THE PROVISIONS OF § 381 CANNOT BE CONSTRUED IN A VACUUM, WITHOUT REFERENCE TO THE ECONOMIC REALITIES INHERENT IN THE CONCEPT OF NEXUS.

A. In § 381, Congress Attempted To Eliminate Taxation Of Foreign Corporations By States In Which They Had Minimal Nexus.

In the debates on the bill, the Senate struggled with the definition of nexus. *See, e.g.*, 105 Cong. Rec. 16476 (1959) (statement of Senator Kerr). Its members viewed the provisions of § 381 as "set[ting] up a minimal standard" for the existence of nexus. 105 Cong. Rec. 17771 (1959) (statement of Representative Celler). That is why Senator Keating, a cosponsor of S. 2213, willingly switched his support to S. 2524:

> I believe that such a concept is equitable. A corporation which employs capital and labor and operates facilities within a State is an integral part of that State's economy and receives a variety of protective and other services for which the State should be compensated. Since these services directly relate to the income-producing activities of the company, a tax on income allocated to these activities is reasonable.
>
> On the other hand, a company which does not have a place of business in a State does not receive any benefits from the State which relate to its income-producing activities. Such a State does not put out a fire on the company's premises, it does not insure its employees against injury on the job, it does not protect its warehouses, it does

> not maintain the streets and highways or subways and utilities needed for the company's functioning. It provides nothing which would justify the exaction of an income tax from out-of-State firms.

105 Cong. Rec. 16362 (1959).

Any construction of the term "solicitation" should not ignore the fact that the very basis for the enactment of § 381 was a minimal benefit or nexus rationale.

B. Wrigley's Construction Of The Statute Discards The Concept Of Nexus That The Statute Reflects.

Wrigley misses the mark when it claims that Wisconsin's nexus arguments should be directed to Congress rather than the Court. Since it will not even know the precise parameters of the statute until this Court issues its decision, Wisconsin has no reason to even consider requesting amendments to any of the statute's provisions.

The relevance of the concept of nexus is that the definition of "solicitation" should immunize minimal state contacts by foreign corporations, not massive economic presence. In that regard, several aspects of this case present particular cause for concern.

Due to its huge sales volume and large share of the market, Wrigley's has extensive nationwide operations. It therefore chooses to employ resident sales representatives. How continuous residency affects immunity under § 381 is unclear. *Hartman*, 29 Vand. L. Rev. at 390. But the Court's decision in *General Motors Corporation v. Washington*, 377 U.S. 436, 447 (1964), *overruled on other grounds, Tyler Pipe Indus. v. Wash. State Dept. of Rev.*, 483 U.S. 232 (1987), clearly indicates that corporate activities conducted by resident employes will not immunize the corporation from a finding of nexus merely because they occur in the home.

In this case, Wrigley's managerial and storage activities based in its employes homes in Wisconsin are so broad in scope that any construction of the term "solicitation" which would preclude a finding of nexus as a jurisdictional basis to tax would be inconsistent with Congressional intent.

Similarly, Wrigley's Wisconsin operations are so extensive that it used Wisconsin landfills as well as taxpayer-financed public employment offices and universities. Any construction of the term "solicitation" should also reflect the economic realities of these benefits and taxpayer-financed subsidies conferred upon Wrigley in connection with its systematic and continuous exploitation of Wisconsin's consumer market.

CONCLUSION

For the reasons indicated herein and in petitioner's initial brief, the judgment of the Wisconsin Supreme Court should be reversed, the franchise tax assessment reinstated, and the cause remanded to the Wisconsin Supreme Court for further proceedings consistent with this Court's opinion.

Dated this 14th day of January, 1992.

JAMES E. DOYLE
Attorney General
State of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
State of Wisconsin
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Counsel for Petitioner

L285BR.RPY